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37P4P No. 06-11612

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

HOMERO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 24, 2007
Certiorari Granted September 25, 2007

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Superseding Indictment 3

Excerpt from Pretrial Conference Transcript 8

Excerpt from Jury Selection Transcript 14

Opinion of the United States Court of Appeals for the Fifth Circuit 24

Judgment of the United States Court of Appeals for the Fifth Circuit 34

Order of the Supreme Court of the United States granting certiorari and leave to proceed *in forma pauperis* 35

RELEVANT DOCKET ENTRIES

U.S. v. Homero Gonzalez
District Court Case No. L-04-1763

DOCKET ENTRY NO. 48

Minute Entry for proceedings held before Judge George P. Kazen: FINAL PRETRIAL CONFERENCE as to Homero Gonzalez held on 1/18/2005 the deft atty informs the Court that this case is a trial. Defense atty. Pena also asks for full disclosure from the govt regarding their witnesses and all criminal information felony history regarding witnesses. The govt announces they will call two co-defts as witnesses and that information will be available to the defense atty. The govt also asks for reciprocal discovery from the defense atty. The parties announces [sic] this will be a two-day trial. Pretrial Conference reset to Friday, January 21, 2005 @ 9:30 a.m. for scheduling of trials. Jury selection to be either January 21, 2005 @ 1:30 p.m. of [sic] Monday, January 24, 2005 @ 9:00 a.m. Appearances: Marina G. Marmolejo f/gvt. Oscar J Pena, Sr. f/dft (Court Reporter: Leticia E. Verdin) (Interpreter: B. Zapata/D. Gonzalez) Deft remanded to custody, filed. (bmendoza) (Entered: 1/22/2005)

DOCKET ENTRY NO. 53

Minute Entry for proceedings held before Judge Adriana Arce-Flores: JURY SELECTION as to Homero Gonzalez held on 1/21/2005. Parties consent to proceed before the U.S. Magistrate Judge. General

Jury Instructions and qualifications of panel by court. Voir Dire conducted. 14 juror [sic] selected. Trial will begin Monday, January 4 [sic], 2005 @ 10:00 a.m. Appearances: Marina Marmolejo f/govt; Oscar Pena, Sr and Oscar Pena, Jr f/deft;. (ERO:Sara Medellin) (Interpreter:Alma Adriano),filed.(mmarquez,) (Entered:2/4/2005).

DOCKET ENTRY NO. 56

Minute Entry for proceedings held before Judge Adrian G. Duplantier: First DAY OF JURY TRIAL as to Homero Gonzalez held on 1/24/2005. Jury sworn. Jury trial began. Govt presented evidence. Juror #11 was excused prior to commencing trial. Appearances: Marina M. Garcia f/govt; Oscar O Pena and Oscar J Pena, Sr. f/dft; (Court Reporter: Val Castano) (Interpreter:Ina Pool/Fred Kowalski) Deft remanded to custody, filed. (mmarquez) (Entered: 2/7/2005)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	**L-04-CR-1763 S**
VS.	§	
	§	
HOMERO GONZALEZ	§	

SUPERSEDING INDICTMENT

(Filed Dec. 7, 2004)

THE GRAND JURY CHARGES THAT:

COUNT 1

(Conspiracy to Possess With Intent to Distribute Controlled Substances)

Beginning on or about January of 1997 and continuing up to and including on or about August 31, 2004, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendant, **Homero GONZALEZ** did knowingly and intentionally conspire and agree with others known and unknown to the Grand Jury, to possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one thousand (1000) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Sections 841(b)(1)(A) and 846.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved at least 10,000 kilograms of marihuana, a Schedule I controlled substance; and

2. Defendant Homero Gonzalez was a manager or supervisor of a criminal activity that involved five or more participants and was otherwise extensive.

COUNT 2

(Possession With Intent to Distribute Controlled Substance)

On or about September 10, 1999, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendant, **Homero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 574 kilograms of marihuana, a Schedule I controlled substance.

COUNT 3

(Possession With Intent to Distribute Controlled Substance)

On or about January 22, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Homero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 453 kilograms of marihuana, a Schedule I controlled substance.

COUNT 4

(Possession With Intent to Distribute Controlled Substance)

On or about February 1, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Romero GONZALEZ** and others, aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 189 kilograms of marihuana, a Schedule I controlled substance.

COUNT 5

(Possession With Intent to Distribute Controlled Substance)

On or about February 11, 2000, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, defendants, **Romero GONZALEZ and Patrick LEYENDECKER** and others,

aiding and abetting each other, did knowingly and intentionally possess with intent to distribute a controlled substance. This offense involved a quantity in excess of one hundred (100) kilograms of marihuana, a Schedule I controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B) and Title 18, United States Code, Section 2.

THE GRAND JURY ADDITIONALLY CHARGES THE FOLLOWING, WITH REGARD TO THE ABOVE-DESCRIBED OFFENSE:

1. This offense involved approximately 609 kilograms of marihuana, a Schedule I controlled substance.

A TRUE BILL

/s/ [Illegible]
FOREPERSON OF THE GRAND JURY

MICHAEL T. SHELBY
UNITED STATES ATTORNEY

/s/ [Illegible]
By: MARINA GARCIA MARMOLEJO
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	L-04-1763
	*	LAREDO, TEXAS
VS	*	JANUARY 18, 2005
HOMERO GONZALEZ	*	

TRANSCRIPT OF FINAL
PRETRIAL CONFERENCE
BEFORE THE HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	ASSISTANT UNITED STATES ATTORNEY By: Ms. Marina Garcia Marmolejo 1100 Matamoros, Suite 200 Laredo, Texas 78040 Appearing for the U.S.A.;
For the Defendant:	LAW OFFICES OF OSCAR J. PENA, SR. By: Mr. Oscar J. Pena, Sr. 1720 Matamoros Laredo, Texas 78040 Appearing for the Defendant;
Court Reporter:	Leticia E. Verdin 1300 Victoria Laredo, Texas 78040 (956) 790-1370

Proceedings recorded by mechanical stenography, transcript produced by computer.

[2] THE COURT: Homero Gonzalez with Mr. Pena, 1763.

MR. PENA: Yes, sir. He's present. That will be a trial, Your Honor.

THE COURT: Okay.

MR. PENA: There's still a couple of points that we need to take up with the Court. It won't take long.

THE COURT: Like what?

MR. PENA: It's just a matter of – we have requested all disclosure – full disclosure on any agreements made by the Government with any witness. We need to get that, Your Honor. And, also, Judge, we have requested –

THE COURT: Well, you're going to get that. Whether you get it today or tomorrow or right as they're testifying, we can work that out. But you're definitely going to get that.

MR. PENA: The criminal record of each prosecution witness. We're particularly interested in the codefendants Leyendecker and Lopez. We need to get that, Your Honor.

THE COURT: Well, I'm not sure of a just general criminal record, but whatever might be usable for impeachment, felonies and – I would say,

offhand, [3] if – whatever can be used – like Rule, what is it, 609 felonies or a felony that the Government has – has given him a deal on. But that would come under the other umbrella anyway, some felony that the Government has negotiated down or something.

But do you have any objection to just felony convictions?

MS. MARMOLEJO: No, Your Honor. Your Honor, also, I responded in writing to his request and I've advised him that the extent of the agreement that we have with any witness is a written plea agreement that's a matter of public record. It's an identical plea agreement that was originally made to his client. So they know what agreements we've made already.

THE COURT: How many people are we talking about?

MS. MARMOLEJO: Possible testifying codefendants? Two.

Your Honor, also, we've requested reciprocal discovery. And to this date, I've received no reciprocal discovery from Counsel, so I imagine they don't have any evidence they're going to introduce. Because I've got –

MR. PENA: Well, here's the thing, Judge. She says the alleged conspiracy covers about four years.

[4] THE COURT: Okay.

MR. PENA: And she wants alibi information. How can we do that on that span of time, Judge? It's impossible.

THE COURT: I know, but I don't – correct me if I'm wrong. I don't think you can put on that defense unless you file a notice. So that's your problem, not mine.

MR. PENA: Our position is that what they're saying is not true. Certainly, we can say that –

THE COURT: Well, of course.

MR. PENA: – that he was there.

THE COURT: Of course.

MS. MARMOLEJO: Sure.

THE COURT: Yes, alibi is not –

MR. PENA: We're not going to say that he was –

THE COURT: – alibi was I've got a witness that says on that occasion I was in Bermuda or something.

MR. PENA: No, that's not it.

THE COURT: Okay.

MS. MARMOLEJO: But in addition to that, Judge, just if they have any documents, any photographs, anything that they intend to introduce. We've

already [5] requested from them in writing and we've gotten nothing.

MR. PENA: We have the – copies of his income tax record for approximately five years. They're welcome to look at them. They show income between $18,000.00 per year to $20,000.00 per year. And we may have some photographs of the warehouse.

THE COURT: Well, let's do – Vero, what is the Friday morning schedule?

THE CLERK: The Friday morning? Only two revocations, Your Honor, and that's it.

THE COURT: Why don't you-all come in Friday morning at – at 10:00, and we'll try to go through whatever is left. But now that you're hearing each other, why don't you try to solve as much of that as you can, and then we'll see if there's any loose ends. So I don't keep everybody waiting here. But –

MS. MARMOLEJO: Yes, sir.

THE COURT: Okay. And the trial – what is it, a several year conspiracy? Is that –

MS. MARMOLEJO: Yes, Judge.

THE COURT: How many days?

MS. MARMOLEJO: Two.

THE COURT: Okay. All right. Is that it for you today?

MR. PENA: Yes, sir.

[6] THE COURT: Okay.

MR. PENA: So it's Friday at 10:00 o'clock?

THE COURT: Yeah. Well, come in at 9:30. I – she says we've got a couple of matters, but – because then we're picking a jury – at least a round of jury picking Friday afternoon, and then again Monday morning. But we'll see how all this plays out.

MR. PENA: Yes, sir.

THE COURT: Okay. Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA,	**CASE NO. L-04-CR-1763**
Plaintiff,	**CRIMINAL**
vs.	**Laredo, Texas**
HOMERO GONZALEZ,	**Friday, January 21, 2005**
Defendant.	**(2:07 p.m. to 4:16 p.m.)**

JURY SELECTION

BEFORE THE HONORABLE ADRIANA ARCE-FLORES, UNITED STATES MAGISTRATE COURT JUDGE

EXCEPTIONAL REPORTING SERVICES, INC
15213 CARTAGENA CT
CORPUS CHRISTI, TX 78418
361 949-2988

[2] **APPEARANCES FOR:**

Plaintiff: MARINA GARCIA-MARMOLEJO, ESQ
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Court Coordinator: Imelda Contreras

Interpreter: Alma Adriano

Court Recorder: Sarah A. Medellin

Transcriber: Andrea Hekimian
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Corpus Christi, Texas 78418
361 949-2988

[3] **Laredo, Texas; Friday, January 21, 2005; 2:07 p.m.**

(Official Interpreter utilized for translation)

(Call to Order)

THE COURT: If I could have the attorneys approach the bench? Right there is fine. Right there is fine so we can just get everything on the record. Thank you. Right there by the mike. Thanks. We're here in L-04-CR-1763, *The United States of America versus Romero Gonzalez.* Presiding judge is United States Magistrate Judge, Adrian Arce-Flores.

Present for the government?

MS. GARCIA-MARMOLEJO: Marina Garcia-Marmolejo for the government.

MR. OSCAR PENA SR.: Oscar Pena, Senior and –

MR. OSCAR O. PENA: Oscar O. Pena.

THE COURT: I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case.

MS. GARCIA-MARMOLEJO: Yes, we are, your Honor.

MR. OSCAR PENA SR.: Yes, your Honor, we are.

THE COURT: Thank you. Then we'll proceed in just a moment.

MS. GARCIA-MARMOLEJO: Thank you, your Honor.

THE COURT: The parties have agreed through consent that this Court will be assisting through the process of jury [4] selection. Is the defendant present?

MR. OSCAR PENA SR.: He is present, your Honor.

THE COURT: Mr. Pena, does the defendant need the assistance of an interpreter at this time, sir?

MR. OSCAR PENA SR.: Yes he does, your Honor.

THE COURT: My understanding is that before these jurors have been seated this afternoon they have already been pre-qualified. That means that the issue of eligibility and excuses and/or exemptions

have already been addressed with the district court; however, I'm sure that there are some issues that have not been addressed in reference to the time. And I will explain that to them briefly but you all can touch up on that as well.

MS. GARCIA-MARMOLEJO: That's fine, Judge.

MR. OSCAR PENA SR.: Thank you, ma'am.

THE COURT: Okay. You know what I will have my secretary –

MS. GARCIA-MARMOLEJO: Yes. Thank you.

(Pause)

THE COURT: We're going to proceed this afternoon and I'd like to introduce myself at this time; I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process. I would like to briefly explain that the process is a necessary but sometimes tedious one.

[5] The Constitution provides that every individual accused of a crime be afforded the right to a trial by jury of his or her peers. Today you are those peers. This is an important right and the history of our country is founded on rights such as these. Therefore, in order for the goals of fairness and justice to be accomplished, it is important for citizens of a community to serve on the jury when they are called. We all

thank you for doing your civic duty. And we'll proceed as efficiently as possible but not at the expense of the judicial process.

Now I will – we are trying to verify generally as the court I go through all necessary qualifications for you as members of the jury panel. My understanding is that you had been called in to the federal court and were already pre-qualified – it sounds like a – a home – you were pre-qualified before you came to my court. It means that you went downstairs and had already spoken to the clerk's office and basically they went through the most important part before you can even get here, meaning that they asked you if you were over 18, if you can read and write English, if you spoke English, if you were not mentally or physically incapable of rendering jury service or if you do not have any pending federal charges. I'm going to pick someone out of this group. Was that done already?

ALL JURORS: Yes.

[6] **THE COURT:** Okay. Thank you. Now I will tell you this because we're going to begin with voir dire. And generally, I will give each side 15 to 20 minutes at the most – now sometimes they go over a little over but these – we have two very experienced attorneys on both sides and they've gone through the jury selection process and voir dire more – more times than I can count on my hands, so fortunately for all of us here, we have two excellent sets of attorneys assisting the Court today.

The next step is this. We are going to go through what they call "Voir Dire." And "Voir Dire" it's French and it means to speak the truth. Now the process and the purpose of voir dire is very important to the judicial system especially to the jury selection process. It enables the Court to determine whether or not there are any prospective jurors that should be excused and it also enables the attorney for both sides, both the government and for the defendant and the parties to allow them to exercise their individual judgment with respect to any preemptory challenges and/strikes used when there is really no reason needed.

For both parties I'm going to introduce present for the government is Marina Garcia-Marmolejo. And she will introduce her case agent. Thank you, Ms. Garcia.

MS. GARCIA-MARMOLEJO: The case agent is Robert Webb and he is with the FBI here in Laredo, Texas.

[7] **THE COURT:** Thank you, Ms. Garcia.

MS. GARCIA-MARMOLEJO: Thank you.

THE COURT: Present for the defendant, Mr. Gonzalez is –

MR. OSCAR PENA SR.: Oscar Pena, Senior. And this young man is my grandson, his name is Oscar O. Pena.

THE COURT: Thank you, Mr. Pena. Now for purposes of this proceeding I'll remind the attorneys for the government and the attorneys for the defendant – I forgot to tell you this earlier. It'll be seven strikes for the government and 11 for the defense. The rule permits six and ten, but I'm going to go ahead and ask that there be 12, the jury seated with two alternates.

THE COURT: Ms. Garcia or Mr. Pena, do you know if Judge Cason asked for more than two alternates in this case?

MS. GARCIA-MARMOLEJO: No, your Honor, he didn't.

THE COURT: Two is fine?

MS. GARCIA-MARMOLEJO: Yes, Judge.

THE COURT: Then we'll have 14 seated jurors. Some of you may have already gone through the process of jury selection and in a few moments I stop talking and I let the attorneys handle the voir dire and that's what's going to happen right now. I am going to – I just briefly explained to you how the process works. The one that's going to go first is the attorney for the government, that's Ms. Garcia-Marmolejo, [8] and then after she speaks to you because she is going to be speaking to you directly, after she speaks to you then it'll be the attorneys for the defense and they will speak with you as well. After that is done then they will make their selection, so we'll try to be as efficient as possible.

I will ask you this. Those of you that have your number whenever you address either side, either the government side or the defense side, you do need to raise up your number so that we can make note of who has been addressing the court and/or the attorneys. This case is scheduled to proceed Monday – my days are off – what days are –

MS. GARCIA-MARMOLEJO: I'm sorry?

THE COURT: Monday to what day, next Monday?

MS. GARCIA-MARMOLEJO: Yes, the 24th.

THE COURT: The 24th. Monday the 24th and is scheduled to start at 1:30 p.m. It is set to go through until Wednesday or Thursday, okay? In a few moments the Court will address any concerns about those specific time lines. Now there are some issues that you may not want to address from your seat. There are some issues that you feel that are too sensitive to be stated out loud. When that occurs the Court will ask that you go to the front where there's like a little door. The court security officer will assist the Court and you will be brought forth to the Court so it won't be like using a microphone or anything. It'll be a private conversation with [9] the Court.

Are you ready to proceed at this time, Ms. Garcia?

MS. GARCIA-MARMOLEJO: Yes, your Honor, we are.

THE COURT: You may proceed and each side will be permitted 15 to 20 minutes.

MS. GARCIA-MARMOLEJO: Okay, Judge. Will you, if I'm getting very close to my time will you let me know?

THE COURT: I'll ring the bell.

MS. GARCIA-MARMOLEJO: Thank you. Good afternoon, ladies and gentlemen. I apologize because of the way the courtroom is set up I'm going to be giving my back to some of you at some point in time, so if you raise your hand and I don't know notice just make sure you get my attention.

We have a brief amount of time to talk to you this afternoon. As the Court indicated my name is Marina Garcia-Marmolejo and I'm an Assistant U.S. Attorney. I represent the people and the United States in the case. This case deals with several charges but it is a drug case. It's a conspiracy involving more than 1,000 kilograms of marijuana. And of course if you're selected as jurors you'll hear about the individual facts in this particular case.

Now as the Court indicated right now all of you took an oath and your oath is just simply to tell us the truth. But if you're selected as jurors, you're going to be taking an oath to follow the law. The law as the judge explains it to you, so [10] this is a really important time for us to get to know each other and for you to tell me if you are going to be able to follow the law

as it's been passed by congress and as the Court is going to explain to you.

I guess one of the first things is this case will last about two days, so if we begin Monday at around 1:30, I guess we'll be done by Wednesday afternoon. Does anybody have any previous commitments; a doctor's appointment or perhaps you're scheduled to be out of town that would prevent you from being in court and serving on this jury? Is there anybody here in that predicament? Yes, what is your number, ma'am?

JUROR NUMBER 20: Twenty.

THE COURT: Number 20, do you have a scheduled –

JUROR NUMBER 20: I have a special ed. child; he's autistic, he's seven and gets out of school at 2:30 and there is no after-school daycare that could take him. I tried but they didn't want –

MS. GARCIA-MARMOLEJO: No, no, that's fine, ma'am. Your Honor, at that this time we would ask that Number 20 be excused.

THE COURT: I think she tried to be excused earlier. And we just called – I don't know how they did not get to you Ms. – is it –

JUROR NUMBER 20: Well I did talk to them but the jury clerk just said –

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40723

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HOMERO GONZALEZ,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 30, 2007)

Before REAVLEY, JOLLY and BENAVIDES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case requires us to consider the conditions under which jury selection may be permissibly delegated to a magistrate judge. Homero Gonzalez was tried and convicted by jury. On appeal, he claims that the delegation of voir dire to a magistrate judge without his express personal assent was erroneous. We disagree and affirm.

I.

A brief description of the procedural events leading up to trial provides a background for an understanding of the case. Gonzalez and his co-defendant were charged in a multi-count indictment with several drug-related offenses. Gonzalez pled not guilty and elected to be tried by a jury. Prior to jury selection, Gonzalez appeared in court six times, twice before Magistrate Judge Arce-Flores, who presided over the initial appearance and the arraignment and bond hearing, and four times before District Judge Kazen for pretrial conferences. At no time during the conferences did District Judge Kazen propose delegating jury selection to Magistrate Judge Arce-Flores.

On January 21, 2005, jury selection was conducted before Magistrate Judge Arce-Flores. At the outset of the process, Judge Arce-Flores said: "I need to ask the parties at this time if they are going to consent to having the United States Magistrate Judge proceed in assisting in the jury selection of this case." The prosecutor responded: "Yes, we are, Your Honor." Gonzalez's attorney, Oscar Pena, also responded: "Yes, your Honor, we are." Magistrate Judge Arce-Flores then stated: "The parties have agreed through consent that this Court will be assisting through the process of jury selection."

Judge Arce-Flores then asked whether Gonzalez was present, and whether he required a translator to which Pena replied affirmatively. Judge Arce-Flores then said, "We're going to proceed this afternoon and

I'd like to introduce myself at this time; I'm the United States Magistrate Judge, Adriana Arce-Flores, and I'm going to be conducting today's jury selection process." The magistrate judge never asked Gonzalez directly whether he consented to having a magistrate judge perform jury selection. The record does not contain any kind of written consent.

The record shows that voir dire proceeded without incident. The magistrate provided a thorough explanation of the process to the parties and the venire members, and permitted both sides to make statements and ask their own series of questions. Gonzalez did not make any objections as to how jury selection was conducted. Gonzalez proceeded to trial before District Judge Duplantier and was found guilty on all counts. Gonzalez timely appealed from the judgment of conviction entered by the district court on April 29, 2005.

II.

On appeal, Gonzalez argues that because he did not consent personally to the district court's delegation of jury selection to a magistrate judge, his case should be remanded for a new trial. Because Gonzalez raised this issue for the first time on appeal, we review for plain error. This appears to be the practice in the other circuits that have considered this type of claim. *See United States v. Rivera-Sola,* 713 F.2d 866, 874 (1st Cir. 1983); *United States v. Jones,* 938 F.2d 737, 744 (7th Cir. 1991); *United States v. Maragh,*

174 F.3d 1202, 1204 (11th Cir.), *opinion supplemented on reh'g*, 189 F.3d 1315, 1316 (11th Cir. 1999). Under the plain error standard, Gonzalez must demonstrate clear or obvious error that affected his substantial rights. *United States v. Fernandez-Cusco*, 447 F.3d 382, 385 (5th Cir. 2006).

A.

Under the Federal Magistrates Act, 28 U.S.C. § 636(b)(3), a federal district court may delegate certain pretrial Article III duties to a magistrate judge. The Supreme Court has twice considered the conditions under which voir dire permissibly may be delegated. In *Gomez v. United States*, 490 U.S. 858 (1989), the Supreme Court determined that permitting a magistrate to conduct voir dire over the express objection of the defendant was not a permissible delegation. *Id.* at 872. Subsequently, however, in *Peretz v. United States*, 501 U.S. 923 (1991), the Court held that under some circumstances, when the defendant does not object, voir dire is one of the Article III duties that may be delegated. *Id.* at 940.

Peretz was charged with importing heroin and elected to be tried by jury. *Id.* at 925. At a pretrial conference at which both he and his counsel were present, the district court asked if there was any objection to having a magistrate conduct jury selection. *Id.* Peretz's counsel said: "I would love the opportunity." Immediately before jury selection, "the Magistrate asked for, and received, assurances from

counsel for [Peretz] . . . that she had [his client's] consent to proceed with jury selection." *Id.* Peretz was tried and convicted. On appeal, he "contended that it was error to assign the jury selection to the Magistrate." *Id.* at 925. The Court granted certiorari to consider whether the delegation of voir dire with the defendant's consent exceeds the scope of 28 U.S.C. § 636 or is inconsistent with Article III. *Id.* at 927.[1]

The Court first considered whether permitting delegation of voir dire was consistent with the purposes of the Federal Magistrate Act. Noting that "with the parties' consent, a district judge may delegate to a magistrate supervision of entire civil and misdemeanor trials," and that "these duties are comparable in responsibility and importance to presiding over voir dire at a felony trial," the Court determined that the Federal Magistrate Act's "additional duties" clause "permits a magistrate to supervise jury selection in a felony trial provided the parties consent." *Id.* at 933. The Court then considered whether such a delegation is constitutional if done with the parties' consent and held that it is, relying on its earlier precedent holding that "[t]he most basic rights of criminal defendants are subject

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[1] The Court also granted certiorari to consider whether "the conduct of petitioner and his attorney constitute[d] a waiver of the right to raise [the erroneous delegation] on appeal," *id.* (internal quotation marks and citation omitted), but ultimately did not reach this issue. *Id.* at 940.

to waiver." *Id.* at 936.[2] The Court concluded by noting that "[e]ven assuming that a litigant may not waive structural protections provided by Article III . . . no such structural protections are implicated by the procedure followed in this case." *Id.* at 937 (internal citation omitted).

Peretz did not clearly address whether the magistrate judge must obtain the defendant's affirmative consent before conducting voir dire and, if so, whether the defendant must consent personally or whether counsel's consent is binding. The ambiguity in *Peretz* has led to a circuit split on what demonstration of consent is required to delegate jury selection. This appears to be a question of first impression for our court.

B.

Gonzalez relies heavily on the Eleventh Circuit decision in *United States v. Maragh,* 174 F.3d 1202 (11th Cir. 1999), which presented a factual scenario

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[2] The Court cites, *inter alia, United States v. Gagnon,* 470 U.S. 522, 528 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States,* 362 U.S. 610, 619 (1960) (failure to object to closing of courtroom waives right to public trial); *Segurola v. United States,* 275 U.S. 106, 111 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Bascaro,* 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States,* 472 U.S. 1017 (1985).

similar to this case. Prior to conducting jury selection, the magistrate judge said, "I am here to select a jury and everybody has agreed to me selecting the jury for Judge Graham. Is that correct?" Both the defense attorney and the Government attorney agreed. *Id.* at 1204. A divided panel found that it was "unclear whether counsel's response to the magistrate judge's question represented the defendant's consent" and remanded to the district court for a factual finding on this question.[3] *Id.* at 1205. The court then held "prospectively, under [its] supervisory powers . . . , that henceforth it will be error for a magistrate to conduct voir dire in a felony case unless the record clearly shows that the defendant has knowingly consented to such procedure." *Id.* at 1207.

The Eleventh Circuit appears to be alone in having reached the conclusion that the defendant's personal consent is required for the delegation of jury selection to be constitutionally valid. The First Circuit, in contrast, has held that the delegation of voir dire is permissible unless the defendant objects. Failure to object constitutes a waiver. *United States v. Desir,* 273 F.3d 39, 44 (1st Cir. 2001). The Seventh Circuit has held that absent an objection, it is not plain error for a magistrate to conduct jury selection in a felony trial. *United States v. Jones,* 938 F.2d 737,

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[3] The dissenting judge would not have remanded for an evidentiary hearing, but instead would have held that the defendant's consent must be obtained on the record before the magistrate may conduct voir dire. *Id.* at 1207.

744 (7th Cir. 1991). The Ninth Circuit has not directly addressed jury selection but, relying on *Peretz,* has held that some form of affirmative consent is required before a magistrate judge may poll the jury. *United States v. Gomez-Lepe,* 207 F.3d 623, 631 (9th Cir. 2000). Similarly, the Eighth Circuit has found that some form of consent is required before a magistrate judge may supervise jury deliberations. *Harris v. Folk Construction Co.,* 138 F.3d 365, 369-70 (8th Cir. 1998).[4]

C.

Given the unsettled state of the law interpreting *Peretz,* and given that this court has never decided what level of consent is required (if any), it is difficult to see how Gonzalez could demonstrate that the delegation of jury selection constituted a plain error. Even if, however, we were to review under a less stringent standard, *Peretz* still provides little support for the position Gonzalez adopts. The fact pattern in *Peretz,* in which the delegation was found to be permissible, is almost identical to that in the instant case. Furthermore, there is no indication that the Court found the absence of specific consent by the defendant to be a dispositive, or even relevant consideration. No court other than the *Maragh* panel of the

[4] Neither *Harris* nor *Gomez-Lepe* discuss whether the required consent must be given by the defendant personally or whether consent given through counsel would be sufficient.

Eleventh Circuit has reached the outcome Gonzalez proposes, and the debate among the other circuits appears to turn on whether affirmative consent is required at all, not on what form this consent must take.

Although certain rights are so fundamental that they must be waived personally by the defendant, Gonzalez provides no support for his contention that the right to have an Article III judge conduct voir dire is among them. "What suffices for waiver depends on the nature of the right at issue. '[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.'" *New York v. Hill,* 528 U.S. 110, 114 (2000) (quoting *United States v. Olano,* 507 U.S. 725, 733 (1993)). As the Government points out, the defendant does not, by waiving his right to have an Article III judge conduct voir dire, waive his right to judicial review of those proceedings. The nature of the right given up is therefore limited, particularly as compared to the other rights that we have held may be waived via counsel. *See, e.g., United States v. Spiegel,* 604 F.2d 961, 964-66 (5th Cir. 1979) (counsel's waiver of a defendant's right to 12-person jury was binding on defendant); *United States v. Muhammad,* 165 F.3d 327, 332-33 (5th Cir. 1999) (counsel's waiver of defendant's right to have an Article III judge preside over a civil commitment hearing was binding on defendant); *Winters v. Cook,* 489 F.2d 174, 179 (5th Cir. 1973) (en

banc) (defendant bound by attorney's decision to waive right to "constitutionally composed" grand jury in murder indictment). In sum, there is no error here; the right to have an Article III judge conduct voir dire is one that may be waived through the consent of counsel.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40723

D.C. Docket No. 5:04-CR-1763-1

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

HOMERO GONZALEZ

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas, Laredo.

Before REAVLEY, JOLLY, and BENAVIDES, Circuit Judges.

JUDGMENT

(Filed Mar. 30, 2007)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

U.S. Supreme Court

U.S. v. Homero Gonzalez, No. 06-11612

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted limited to the following Questions: "1) Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? 2) Did the court of appeals err when it reviewed petitioner's objection for plain error?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.